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No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

V.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT INDIANA STATE TEACHERS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. DARKO
BAYH TABBERT & CAPEHART
One Indiana Square
Suite #1500
Indianapolis, Indiana 46204
(317) 639-5444

Attorney for Respondent
Indiana State Teachers
Association

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals abused their discretion in placing on the State of Indiana the responsibility for financing the remedy for a constitutional violation involving racial segregation among public school districts in Indiana where the constitutional violation was committed solely by the State and not by any of the affected school districts.

2. Whether the District Court and Court of Appeals erred in holding that a state statute apportioning the costs of interdistrict court-ordered transfers among the State and its school districts did not apply to a situation in which the State had been adjudicated the sole violator and, in any event, could not serve to limit the State's liability for its own constitutional violations.

STATEMENT OF THE CASE

Respondent, Indiana State Teachers Association, adopts the statement of the case set out by Respondent, Board of School Commissioners of the City of Indianapolis, in its Brief in Opposition filed herein on October 18, 1982.

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals did not err in imposing the costs of desegregation upon the State of Indiana in circumstances in which the substantive desegregation remedy was necessitated by wrongdoing on the part of the State of Indiana, and was tailored by the District Court to correct the effects of the State's wrongdoing.

The State statute enacted in 1974, is not applicable to the desegregation remedy ordered by the District Court in this case. It was adopted to deal with the costs of desegregation in instances in which one school district engaged in segregation. It was not intended to cover the present situation in which the State itself has been found guilty of segregatory practices. Even if the statute were by its terms

applicable the District Court and Court of Appeals did not err in adopting a different method for allocating the costs of desegregation.

ARGUMENT

ISSUE 1.

The State of Indiana has been found responsible for interdistrict segregation of the schools of Indianapolis and Marion County, Indiana, by virtue of enactment of the Uni-Gov Act and by virtue of discriminatory state housing practices. *United States v. Board of School Commissioners*, 637 F.2d 1101 (7th Cir. 1981); *United States v. Board of School Commissioners*, 573 F.2d 400 (7th Cir. 1978). The Courts below have required that suburban school districts, as subdivisions of the responsible State of Indiana, participate in a desegregation remedy, even though those suburban school districts did not participate in the actual causes of segregation.

The question which Petitioner now seeks this Court to review is "Who should bear the cost of the desegregation plan?". The District Court determined that the State of Indiana should bear a substantial part of the cost because the State, not the individual school districts, was responsible for segregation in the first place. The District Court was affirmed by the Court of Appeals.

A Federal District Court has the power to take all necessary steps to eliminate from the public schools all vestiges of state imposed segregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 67, 28 L.Ed.2d 554 (1971). The State of Indiana, already having necessitated participation by the local school districts in the remedial measures, now wants to increase the burden and require the school districts to *pay for the remedy* out of their regular budgets. Desegregation is aimed at the quality as well as equality of education. *Wright v. City Council of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972). To require the various school districts to pay for desegregation is to defeat the purpose of quality education

by cutting into the substantive school budgets and thereby reducing the quality of teaching and of education available to transferred students as well as to the resident students of the school districts. Appropriate remedial standards in school desegregation litigation include discretion in the trial court to assess the cost of desegregation upon the State, and other District Courts have required states to bear the costs. *Lidell v. Board of Education of City of St. Louis, Mo.*, 492 F.Supp. 351, 359 (E.D.Mo. 1980); *Reed v. Rhodes*, 455 F.Supp. 569, 606 (N.D. Ohio 1978).

Here, the State of Indiana has been held to be primarily responsible for the interdistrict segregation in Indianapolis and Marion County schools. Therefore, the State of Indiana must bear its "appropriate share" of the cost of desegregation. In this instance, because it has been found to be primarily liable, the State's appropriate share is a substantial part of the cost of interdistrict desegregation, as assessed by the District Court.

A District Court remedy must be designed to restore the victims of discrimination to the position they would have occupied absent the conduct. The nature of the remedy is to be determined by the nature and scope of the Constitutional violation. *Morrilton School District No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979). The victims of the State's discriminatory actions are the school children and parents of school children in the Indianapolis Public Schools. To require these victims, as taxpayers, to pay for the desegregation plan would be to further victimize them in an effort to right the wrong for which these people have no responsibility. True, these individuals and all citizens of the State of Indiana will bear some of the cost under the District Court's financing plan. However, it would be onerous to make only a small portion of the citizens of Indiana suffer the entire burden as a result of the actions of the Indiana General Assembly and state housing authorities.

The dual system in the Indianapolis schools is not of recent vintage. The instant law suit, still active in the

District Court, was filed in 1968. Many IPS Students have graduated and have become taxpaying citizens of the IPS District. The State would now have them pay to remedy the very dual system which directly injured them as students. Had IPS been solely responsible for interdistrict desegregation, that burden would be an unfortunate necessity. (In fact, IPS has shouldered the entire cost of the Court ordered remedy for intradistrict desegregation.) But to require these individuals to carry a disproportionate share of the cost of remedying the effects of the State's discriminatory acts and policies would be unconscionable. The desegregation plan adopted by the District Court has successfully been in effect for a year and a half, since August, 1981. The financing plan has fairly and justly allocated the costs of the desegregation remedy for the same period of time. Review by this Court of that financing plan is unnecessary and could well be disruptive to a presently harmonious desegregation effort.

ISSUE 2.

The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, states that it "applies solely in a situation where a court of the United States or of the State of Indiana" has determined that three (3) statutory conditions are in existence. The first of those statutory conditions is that:

> "(a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders...". I.C. 20-8.1-6.5-1.

The desegregation remedy adopted by the District Court and unanimously affirmed by the Court of Appeals does not deal with a situation in which one transferor corporation has violated the equal protection clause by practicing segregation within its borders. To the contrary, the desegregation remedy now in effect in Marion County,

Indiana, was precipitated by the actions of the State of Indiana through its enactment of a governmental reorganization statute "Uni-Gov" and its public housing policies. Nothing in the Transfer Statute evinces a legislative intent that the provisions of the statute should apply to instances of State culpability. There are obvious and significant differences between State culpability and the culpability of an individual school district within its own boundaries.

If the District Court had simply determined that "a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States" then an interdistrict remedy would not even have been permissible. *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). The Court of Appeals correctly determined that the transfer statute is not even applicable to the desegregation plan now in effect in Marion County, Indiana.

CONCLUSION

Throughout its participation in these proceedings, since 1975, at both the trial and appellate court levels, the Indiana State Teachers Association has devoted its attention to the necessity for developing a desegregation plan which will work. It maintains that the plan adopted by the District Court in July of 1979, which is now in effect throughout Marion County, Indiana, is a just and equitable plan, with the provisions necessary to bring about not simply racial mixing, but harmonious and efficient desegregation benefiting all of the involved students as well as the community at large.

ISTA contents that no aspect of the desegregation plan is more important, nor more central to its harmonious operation, than the District Court Judgment of July 17, 1981, now under consideration. The Judgment imposes the burden for paying a substantial part of the costs of desegregation upon the State of Indiana, rather than upon the Indianapolis Public Schools, or any of the suburban school corporations. The alternative to the District Court Judgment would necessarily have been to pay for desegregation out of already sorely depleted school corporation budgets, thus impeding the education of not only the newly desegregated students, but of every student in the affected area. Bringing about desegregation by reducing the funds available for the education of other school children would have been so unfair, so unjust, as to have threatened the operation of the desegregation plan itself.

To tell black students that they are going to be transported for the purpose of desegregation, and to tell suburban students that they are going to have newly desegregated students in their midst is one thing. To tell *all* of the students and their parents that less money is going to be available for their education as a result of the desegregation process is something else. The District Court

made the right decision, it chose to fund the desegregation plan in the manner most likely to continue the harmonious operation of that plan. It was affirmed by the Court of Appeals.

For the foregoing reasons, the State's Petition for Writ of Certiorari presents no issue worthy of review by this Court. The Orders below imposing upon the State the costs of remedying segregation caused by the State were well within developed standards for remedies in desegregation cases. Any other choice for funding the desegregation plan could well have interferred with the harmonious application of that plan throughout Marion County, Indiana.

Respectfully submitted,

Richard J. Darko

Richard J. Darko

BAYH TABBERT & CAPEHART
One Indiana Square, Suite #1500
Indianapolis, Indiana 46204
(317) 639-5444

Dated November 18, 1982

PROOF OF SERVICE

I, Richard J. Darko, being duly sworn, state that I am the attorney of record for Indiana State Teachers Association and that two copies of the foregoing Brief of Respondent Indiana State Teachers Association in Opposition to Petition for Writ of Certiorari has been served upon the following persons by first class United States mail, postage prepaid, this 16 day of November, 1982.

Lewis Bose, Esq.
William Evans, Esq.
1100 First Federal Building
Indianapolis, IN 46204

James B. Burroughs, Esq.
2560 City County Building
Indianapolis, IN 46204

Richard L. Brown, Esq.
156 East Market Street
Indianapolis, IN 46204

Charles Hunter, Esq.
810 King Cole Building
Indianapolis, IN 46204

Harold E. Hutson, Esq.
1322 Circle Tower Building
Indianapolis, IN 46204

Charles D. Kelso, Esq.
3200 Fifth Avenue
Sacramento, CA 95817

United States Attorney
274 United States Courthouse
Indianapolis, IN 46204

John O. Moss, Esq.
156 East Market Street
Suite #902
Indianapolis, IN 46204

Donald A. Schabel
3300 Indiana Bank Tower
Indianapolis, IN 46204

William O. Schreckengast
380 Main Street
Beech Grove, IN 46107

John Preston Ward
P.O. Box 88392
Indianapolis, IN 46208

John Wood, Esq.
500 Union Federal Building
Indianapolis, IN 46204

William L. Taylor, Esq.
Center for National Policy Rese
Catholic Univ. Law School arch
Washington, D.C. 20064

David Michael Wallman
Deputy Attorney General
219 State House
Indianapolis, IN 46204

Alexander Ross, Esq.
Michael Sussman, Esq.
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Richard J. Darko
Richard J. Darko

BAYH TABBERT & CAPEHART
One Indiana Square, Suite #1500
Indianapolis, Indiana 46204
RJD:sr001/34